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IS A CARRIER OF PASSENGERS REQUIRED TO EXERCISE AN EXTRAORDINARY DEGREE OF CARE AS A MATTER OF LAW?

Overturning verdicts because of error in the instructions is becoming more and more a reproach to the administration of the law in this country. The practice of appellate courts in subjecting the instructions of a trial court to microscopic examination is ridiculously unjust to litigants and lawyers, and the overturning of a verdict because, upon such examination an appellate court believes a more accurate statement of the law could and should have been prepared, is to condemn the administration of the law in the eyes of all practical citizens as being ridiculously incompetent in an age that demands efficiency in all the important transactions of life.

Take for example the recent case of Union Traction Company v. Berry, 121 N. E. 655. Here the trial court prepared an instruction declaring that a carrier of passengers was held to the exercise of the highest degree of care. This proposition would appear to be elementary to every lawyer familiar with common law principles of negligence. But the Supreme Court held that this instruction was bad, since in Indiana there are no degrees in negligence. Therefore, the case must go back for retrial under instructions to the jury to determine what would be "ordinary care" on the part of a common carrier in protecting its passengers.

What practical difference can there be between a rule which attempts to recognize degrees of negligence, and one which declares that there are no degrees of negligence, but which further declares that every one must exercise such care as "a person of reasonable prudence would exercise *in view of all the conditions and circumstances* as disclosed by the evidence in the particular case?" These are the words of the appellate court in the instant case, which the court says measures the duty of a carrier of passengers or anyone else who sustains such a relation to another from which arises a duty to use care. Even under this rule, as announced by the Indiana court, ordinary care will vary in accordance with the "conditions and circumstances" of each case. The care which a man of ordinary prudence would exercise in unloading a car of dynamite will necessarily be different from that which he would exercise in unloading a car of lumber. It is a mere play on words to say that the same degree of care is exacted in one case as in the other, on the theory that what would be ordinary care in one case might not be ordinary care in another case.

The facts in the case cited brought the question of the degree of care required of carriers of passengers, into sharp relief. Plaintiff was killed by being knocked off the running board of an electric car by the girders of a bridge built by the defendant and set so close to the track as to make it dangerous for persons to stand on the running board of an "open" or "summer" car. Plaintiff got on the car a short distance from the bridge and was walking along the running board to secure a seat in the car when he was struck by a girder of the bridge and killed. Negligence was grounded on the failure of the conductor to warn the plaintiff of his danger in being on the running board as the car passed over the bridge. It was shown that the company knew of this danger and that it was the custom of many conductors to stop their cars before entering the bridge and requiring passengers standing on the running board to get inside the car. The following instruction, which would have been good in practically every state in the union, was the only error the court could find on which to overturn the just and reasonable judgment given for the plaintiff in this case:

"If you find from the evidence in this case that on and about the 23d day of May, 1914, the defendant was a common carrier of passengers, then I instruct you that it was held to the highest degree of care and diligence for the safety of passengers consistent with the mode of conveyance employed, and that the omission of the defendant to exercise the highest degree of practicable care constituted negligence on its part."

In explaining the error in the instruction, the Supreme Court said:

"The use of such terms as 'slight care,' 'great care,' 'highest degree of care,' or other like expressions in instructions as indicating the quantum of care the law exacts under special conditions and circumstances, is misleading; and when so used they constitute an invasion of the province of the jury, whose function it is to determine what amount of care is required to measure up to the duty imposed by law under the facts of the particular case. The law imposes but one duty in such cases, and that is the duty to use due care; and the law recognizes only one standard by which the quantum of care can be measured, and that is the care which a person of ordinary prudence would exercise under like circumstances.

"If greater precautions are required to protect passengers while in transit, it is because the conditions and circumstances surrounding them are different and involve more danger, and not because of the existing relation. As has been said, the surrounding conditions and attending circumstances, as well as the danger involved, present questions for the consideration of the jury in determining what precautions reasonable care required under the facts disclosed in the particular case. This presents a question of fact for the jury and not one of law for the court."

The court is here attempting to blaze a new trail in the law. The common law has been content for many years to distinguish between degrees of negligence, especially in cases where public policy dictated that an unusual or extraordinary degree of care should be exercised. This has always been so in the case of carriers of passengers who, *as a matter of law*, were held to the highest degree of care for the safety of passengers. That this rule is more than the mere application of the rule of ordinary care to the peculiar circumstances of the relation of carrier and passenger, is clearly shown by the fact that the common law did not even permit the carrier to contract for relief against the negligence of himself or his employes.

It would be unnecessary to go outside of the judicial precedents laid down by a long line of eminent Indiana jurists to show that the present judges of the Supreme Court of Indiana are taking a very presumptuous attitude in overruling, as they do expressly, this long line of well considered precedents. Hundreds of Indiana cases could be cited, but just one citation from the case of Citizens Street Railway Co. v. Jolly, 161 Ind. 80, is sufficient to show how far afield the court goes in the instant case. The court in the Jolly case said:

"Appellant Company was a common carrier of passengers for hire. The *law*, therefore, exacted of it the *highest degree of care, skill and diligence* for the safety of its passengers *in operating* its cars and road, consistent with the mode of its conveyance and likewise in the construction and maintenance *of its tracks*, roadway and machinery."

The court's insistence on a single standard or measure of duty would be logical if it were not for the fact that the common law has singled out certain relationships and certain duties in respect of which it requires a high degree of care as a *matter of law* and not as a matter of fact. The general rule as to ordinary care, as stated by the court, operates in all cases where the law itself does not require specifically a different degree of care. It may be that in this respect the law is not logical. It may be that this higher degree of care thus demanded by the law is nothing more than ordinary care applied to "the circumstances and conditions of the particular case," but it is probable as well as reasonable to suppose that the law does not wish to leave such an important matter affecting

the safety of the people to the unreflective judgment of juries and that it prefers to direct the attention of the jury to the unusual character of the defendant's duty in such cases to exercise the highest degree of care.

NOTES OF IMPORTANT DECISIONS.

CONSTITUTIONALITY OF ACT OF CONGRESS AUTHORIZING JUDGMENTS AGAINST RAILROADS WHILE UNDER FEDERAL CONTROL.—Here and there in groups of lawyers it has not been uncommon to hear it contended that Section 10 of the Act of Congress of March 21, 1918, was unconstitutional. This act it will be remembered, provided for the operation of railroads while under federal control and for the compensation of their owners. Section 10, now being so much discussed throughout the country, provided *inter alia*, as follows:

"Carriers while under federal control, shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers, and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government."

The discussion, hitherto, of this section has usually been in reference to Order No. 50 and its apparent conflict with section 10, which gives a right of action directly against the carrier and not solely against the Director General as the Order provides. It appears, however, that the railroad companies intend to rely on General Order No. 50, and to take the position that they are not responsible for any damages resulting from injuries occurring while the roads are under federal control and that Section 10 above referred to is unconstitutional as depriving the railroad companies of their property without due process of law. This defense was recently set up by the Pennsylvania Railroad Co., in a case tried in the City of New York. Schumacher v. Pennsylvania R. R. Co., 61 N. Y. L. J. 141. This case has just been heard and determined at *nisi prius* and the contention of the defendant sustained, from which an appeal is now pending.

In view of the great importance of the questions involved we shall violate one of our own precedents in commenting on this case, though it is pending in the Appellate Division of the New York Supreme Court.

In answer to the contention that Section 10 is unconstitutional, the attorney for the plaintiff called attention to the fact that the property of the railroad while under federal control was exempt from levy and sale under execution and that therefore its property could not be *taken* and was not affected by this judgment. To this the trial court in its opinion declared:

"In time the various transportation systems taken over by the government will doubtless be returned to the various railroad companies which own them, and it is pertinent to ask whether unsatisfied judgments against carrier corporations might not be collected by execution against the property returned. Such property would then cease to be under "federal control," and the prohibition against process against such property would cease to operate."

It might be added that the property of a railroad exempt from sale under execution is only such property as was taken over by the federal government and does not apply to money in the bank, lands, bonds, stocks and other such property not taken over by the government. This has been recently held in the case of United States Railroad Administration v. Burch, 254 Fed. Rep. 140, where it was held that certain lots owned by a railroad company not necessary to its business as a public carrier could be sold under execution. It was there specifically held that Congress had not given authority to the Director General of Railroads to take possession of property of that kind.

In speaking of the relation of the railroads to the governments, the court, in the principal case, said:

"The federal government, in the control and operation of the railroad properties taken over, is in no sense the agent or representative of the railroad companies to whom the systems belong. By the 12th section of the act the moneys and other property derived from the operation of the carriers during federal control are *'declared to be the property of the United States.'* If a profit is realized from such operation, the profit belongs to the United States. By section 8 the President is given power to exercise the powers granted him with relation to federal control *'through such agencies as he may determine, and may fix the reasonable*

compensation for the performance of services in connection therewith.' In other words, the federal government, in operation of the systems taken over, acts as the principal and not as the agent of the owners of the transportation system, becoming a lessee of the railroad on terms agreed upon between it and the companies. Where no agreements as to rentals are reached, and where no such formal leases are entered into, the government is to pay such a rental as may be thereafter determined reasonable and just by and in the methods prescribed. In short, the relation between the government and the carrier is nothing more or less than that of lessor and lessee, the lessee operating the road for itself and on its own account. The employees engaged in operating the various systems are, for the time being at least, the government's servants and agents, subject to its directions, paid by the government and subject to dismissal by it. This relation of the government and the carrier between themselves and to their employees and to the general public has been fully and repeatedly recognized by a series of orders issued by the Director General of Railroads under federal control."

The court then refers to the various orders of the Director General showing that the government was exercising complete control over the railroads, having the power to employ and dismiss the servants of the carriers. From this the court reasons that since the profits of the enterprise, as well as the control, belong to the government, the liability for all injuries occurring while the government is in control should be theirs too, and theirs exclusively. The court then states its conclusion on this point in the following language:

If our view and construction of the statute in question is correct we are face to face with the legal question whether, in so far as it authorizes actions and judgments against carriers for the negligence or default of the government or its agents, such provisions are constitutional and valid. To state the question is to answer it. We can reach no other conclusion than that in that respect Congress has exceeded its constitutional powers. It is repugnant to the great underlying principles of our jurisprudence and violates, we think, the express provisions of the Fifth Amendment to the Federal Constitution, declaring 'No person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation. Certainly the taking of the property of a corporation to pay the debt or liability of the government, for which the corporation is in no way responsible, violates this provision of the constitution and deprives it of the equal protection of the law."

This suit was brought before General Order No. 50 was issued, but the court suggests that plaintiff should have substituted the Director General for the defendant. In discussing this order the court said:

"The order provides that in all actions of the same character already pending against the carrier company, the pleadings may *'be amended by substituting the Director General of Railroads for the carrier company as party defendant and dismissing the company therefrom.'*

"It is safe to assume that the Director General of Railroads would not have issued the order in question except upon the advice and after consultation with the highest legal advisers of the government, and that it was promulgated only after the most careful and mature consideration of the constitution and legal questions presented. We are safe, we think, in concluding that the order represents the considerate judgment of the government authorities on the questions we have been considering in this opinion.

"The questions here presented are not whether the plaintiff has an adequate remedy for the death of her husband, but whether her judgment should be one against the Pennsylvania Railroad Company or against the Director General of Railroads. Her action was begun before order No. 50 was promulgated. Still she might have asked for the substitution of the Director General as provided in the order. We are not prepared to say that even at this date after the trial and a verdict she might not amend by substituting the Director General."

Until there has been an authoritative construction of Section 10 of the Act of March 21, 1918, we believe the only safe thing for attorneys for plaintiffs in suits against carriers to do is to join the railroad as a defendant and protect their rights in the premises. There is no doubt that Congress will make provision for the payment of all claims against the carriers, but political action is so uncertain and the recent decisions of state and federal courts have fluctuated so widely on this and other questions growing out of federal control that it is best to be prepared for what may be the final construction of this much debated situation.

RIGHT OF FREE SPEECH AND THE FIRST AMENDMENT.—It is generally the opinion of leaders of political thought that the stringent provisions of the Espionage Act will not be and were not intended to be the standards by which the published words and writings of men are to be hereafter judged, and the Supreme Court of the United States in the recent case of Schenck v. United States, 39 Sup. Ct. Rep. 247, is clear on this point. In upholding a conviction under this act the court was free to admit that the published words for which

the defendant was adjudged guilty under the Espionage Act would not have been indictable if there had been no war. Nor would Congress have been justified in passing such a law in the absence of the unusual emergency created by the recent world war. On this point the court said:

"It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose, as intimated in Patterson v. Colorado (205 U. S., 454, 462, 27 Sup. Ct., 556.)"

The defendant Schenck, in the case cited, was the general secretary of the Socialist Party. It was found that he superintended the publication and distribution of a document addressed to 15,000 men who had been drafted for service in the army. The document in question recited the first section of the Thirteenth Amendment; said that the idea embodied in it was violated by the Conscription Act, and that a conscript is little better than a convict. In impassioned language it intimated that conscription was despotism in its worst form, and a monstrous wrong against humanity in the interest of Wall Street's chosen few. It said: "Do not submit to intimidation," but in form at least confined itself to suggesting peaceful measures such as a petition for the repeal of the act. The other side of the sheet was headed "Assert Your Rights." It stated reasons for alleging that anyone violated the Constitution when he refused to recognize "your right to assert your opposition to the draft," and went on: "If you do not assert and support your rights you are helping to deny or disparage rights which it is the solemn duty of all citizens and residents of the United States to retain." It described the arguments on the other side as coming from cunning politicians and a mercenary capitalist press, and even silent consent to the conscription law as helping to support an infamous conspiracy.

The court held that while the words used were such as were not unusual in political campaigns and in political attacks on certain laws held to be objectionable or unconstitutional, yet that in this case the evident purpose of the circular was to obstruct the draft and to injure the military power of the United States, then engaged in war. The defense was that the Espionage Act, if it made such appeals to the people criminal, was void as in contravention of the guarantee of freedom of speech and the press guaranteed by the first amendment. On this point the court said:

"The most stringent protection of free speech would not protect a man in falsely shouting 'fire' in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force (Gompers v. Buck's Stove & Range Co., 221 U. S., 418, 439, 31 Sup. Ct., 492). The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no court could regard them as protected by any constitutional right. It seems to be admitted that if an actual obstruction of the recruiting service were proved, liability for words that produced that effect might be enforced. The statute of 1917, in section 4, punishes conspiracies to obstruct as well as actual obstruction. If the act (speaking, or circulating a paper), its tendency and the intent with which it is done are the same, we perceive no ground for saying that success alone warrants making the act a crime (Goldman v. United States, 245 U. S., 474, 477, 38 Sup. Ct., 166).

THE PROBLEM OF THE ALIEN.

A question which will soon demand practical solution here is whether there is to be an alteration in the state of our law regulating the attitude of this country to aliens. The subject may be considered from two points of view and existing statutes may be so classified: first, the political (including public health and police), and, second, the commercial. The first is shown in the Aliens Act of 1905, which deals with the rights of entry and expulsion of aliens. The operation of the Act is confined to alien steerage passengers who come into the United Kingdom otherwise than in the course of proceeding to some destination, and it provides that these may be landed only at certain ports and subject to leave granted by an immigrant officer and leave to land may be refused in the case of any immigrant who is undesirable. An immigrant is considered to be undesirable either (a) if he cannot show that he has means of decently supporting himself and his de-

pendents (if any), or (b) if he is an idiot or lunatic or so infirm or diseased as to be likely to become a charge to the public, or (c) if he has been sentenced abroad for an "extradition" crime, or (d) if an expulsion under the Act has been made in his case. But leave to land is not to be withheld where the immigrant can show that he is seeking admission solely on the ground that he wishes to avoid persecution or prosecution for something connected with his religious or political belief. The master of a ship landing or embarking passengers at any port in the United Kingdom must furnish such particulars of any alien passengers as may be called for by the Home Office orders. A power of expulsion is given to the Home Secretary in the case of an alien who has been guilty of certain offenses specified in the act, and also in the case of an alien who is certified by a court of summary jurisdiction within twelve months after he has entered the United Kingdom to have been in receipt of parochial relief or to have been found wandering without ostensible means of subsistence, or to be living under insanitary conditions due to overcrowding. If an alien against whom an expulsion order under the Act is made is, at any time, found within the United Kingdom in contravention of the order, he is to be deemed to be a rogue and vagabond within the meaning of the Vagrancy Act 1824, and is liable to punishment accordingly.

Now it is obvious that these provisions fall very far short of the present public demands for regulation of aliens. They are merely a weak expression of the rights which every civilized state, if it chooses, may properly exercise of excluding criminals and paupers. But how is the law to be amended? Will further legislation prohibit the landing of all aliens of whatever condition or rank; will it expel or compel the naturalization of aliens who have already found their way into the country? Inevitably such measures, if taken, would provoke retaliatory measures by other states, and it might be necessary to discriminate between various nationalities, according as they might be hostile or friendly to Britain. In time of war, particularly a world-wide war such as that recently waged, when commercial intercourse between peoples is largely suspended, restrictions may be comparatively easy, but we trust we have at least shown that the question in peace time is materially different, for while both in war and peace the primary duty of a state is to do whatever is necessary for self-preservation, it may well be that a course of action which would in war time tend to strengthen a state might if adopted in peace time actually weaken it.

Take next the commercial point of view. In this respect the traditional policy of our country has been to admit and welcome all who seek our shores and submit themselves to our laws, the only considerable exception to that principle being the policy of the merchant shipping acts derived from the old navigation laws that British ships shall be owned only by natural-born British subjects, and even this has been rendered practically void by our joint stock company law, which permits of anybody holding shares in a shipping company.

War conditions have even already been responsible for several enactments which have for their object the ascertainment of the extent to which aliens may operate in commerce here. The registration of Business Names Act, 1916, compels disclosure of nationality of all partners and a similar provision applicable to company directors is contained in The Companies (particulars as to directors) Act of 1917. The British Ships (transfer restrictions) Act of 1915 and 1916 render void unless with consent of the board of trade any transfer of a shipping share or mortgage to a person other than a natural born or naturalized British subject; and the Non-Ferrous Metal Industry Act prohibits foreigners dealing in certain metals without a board of trade license.

These measures form an interesting chapter in our legislation, and the question is now that the war has ended whether further acts of a similar purport should be passed. The statutes mentioned are not drastic. Generally speaking the principle running through them is not prohibition or even prevention of alien operators, but ascertainment and control. In the writer's opinion this is a wise conservation. The same tendency is particularly marked in the reports of several government committees. For instance, in April, 1916, a board of trade committee appointed for the purpose of investigating the general question of trade relations after the war reported against imposing restrictions on aliens becoming shareholders in British companies, but in favor of definite information as to the nationality of the shareholders in every British company. On the other hand, Lord Balfour of Burleigh's Committee on Imperial Trade Relations, which reported in December, 1917, discouraged any attempt to secure this information. And lately the committee appointed to report on amendment of our company laws have recommended that except in the case of shipping companies and "key" industries there should be no restriction and no disclosure of alienage.—"We think the true policy is complete freedom. Simplicity and the absence of possible legal pitfalls are essential to free commercial development." A careful perusal of the last-mentioned report is recommended to all interested in the wider commercial aspects of the alien question.

To conclude, Great Britain may in the past have been too generous in its reception and treatment of aliens, but in our opinion that error is preferable to a mean national jealousy, such as the policy advocated by not a few advisers might lead to. The sound principle is to maintain the traditional policy in favor of freedom, but in subordination to the elementary political duty of self-preservation. In applying that rule it may be helpful to follow the analysis above suggested of national policy, public health, police administration, and commercial interests, giving in the last-named category special consideration to shipping interests and "key" industries.

DONALD MACKAY.

Glasgow, Scotland.

EXPERIENCE OF STATES PROVIDING FOR STATE INSURANCE FOR COMPENSATION RISKS.

It is probable that a majority of those who have given thought to the insurance features of Workmen's Compensation Laws have been disinclined to favor State insurance of such risks. In the first place it appears to them to be wrong in principle since it deprives individuals and corporations licensed to engage in writing casualty insurance of their right to continue to transact a business which in its nature is not public but private. It appears to them to be an evidence of the growth of socialism and therefore leading in the wrong direction and discouraging individual initiative. It has been condemned as offering opportunities for graft and the playing of bad politics, resulting in injury both to the administration of the government and to the administration of the fund itself. All of these arguments we have heretofore presented to our readers.

Following our usual policy, *audi alteram partem*, we wish here to set forth, not exactly the arguments in favor of State insurance, but the experience of the States which have experimented with the new idea. These reports were in the form of letters written to Hon. H. C. Chancellor, member of the present General Assembly of Missouri, which has been considering the passage of a Workmen's Compensation Law and is halting between two opinions on the question of State insurance.

Letters were received by Mr. Chancellor from the administrative heads of the Work-

men's Compensation Boards in Maryland, Montana, Nevada, New York, Nova Scotia, Ohio, Ontario, Pennsylvania, Washington, West Virginia and Wyoming. As the States of Wyoming, Washington, Ontario, Ohio, Nova Scotia and Nevada have exclusive State insurance, we have omitted the reports from those States as likely to be biased and not resting on any fair test of the relative merits of exclusively State and competitive insurance.

The replies alluded to below were furnished by the following: *Maryland:* Hon. Charles D. Wagaman, chairman of the State Accident Commission of Maryland; *Montana:* Hon. A. E. Spriggs, chairman of the Industrial Accident Board of Montana; *New York:* Hon. F. Spencer Baldwin, manager of the State Insurance Fund of New York; *Pennsylvania:* Hon. William J. Roney, manager of the State Workmen's Insurance Fund of Pennsylvania. The reports of these four States having competitive insurance, and being thoroughly representative of all sections will no doubt prove interesting and valuable to students and legislators.

Mr. Chancellor submitted eight questions to the parties named, to some of which the answers were unanimous. All declared that politics had not in any sense interfered with the administration of the fund, which was conducted on a purely business basis. In Pennsylvania, it is said that all officials appointed to administer the fund have had experience in the insurance field. The question, "Is your State Fund actuarily solvent?" is answered in most cases in the same way as another question, "Has your State Fund been successful?" We will report only the answer to the former question.

In answer to the question whether there has been any demand for the repeal of the State Fund feature of the law, the uniform reply is that there is not, except on the part of accident insurance companies and a few employers who fear that they are not sufficiently covered. All these objections are considered in answer to a further question which is fully reported below. In answer to the question whether the State insurance scheme is regarded as being socialistic, the replies are uniformly in the negative. This was a wholly unnecessary question as it called for a matter of opinion on a subject largely political in its nature and certainly only vaguely, if at all, definable. We will omit the answers to this question and also to the question whether claims are paid promptly. All of the replies would indicate that the claims are paid almost as soon as they are presented, and quite in advance of payment by private companies, who sometimes interpose technical objections. There seems to be no lack of money in any of the State funds to pay all claims.

Here are the questions to which the answers are given in the reports which follow. The numbers of the questions here given correspond to the numbers of the respective paragraphs in the replies given:

I. Has Your State Fund Been Sucessful?

II. Are You in Favor of Making Your State Fund Plan of Insurance Exclusive?

III. How Much Cheaper is Insurance With Your State Fund Than With Private Insurers?

IV. Please Answer Any Criticisms Which the Enemies of Your State Fund Are Making Against It.

The following are the replies:

MARYLAND.

I.

Our State Fund has been successful. It has been on a competitive basis since its organization, November 1, 1914. It competes with about thirty casualty companies who are writing compensation insurance in Maryland, and we are now carrying about one-tenth of the employers of the State and this without any expensive organization for the solicitation of business for the fund.

II.

While our State Fund is now on a competitive basis, it is my opinion that it will

eventually write all compensation insurance in this State, because it will be able to write this insurance at lower premium rates than casualty companies and, therefore, nearer the actual cost of such insurance.

III.

It is difficult to answer the third question in any very definite manner, because there are so many classifications, and each carrying a different premium rate. On a general average, our State Fund rates are about fifteen to twenty per cent lower than casualty company rates. In some classifications our rates are higher and in others very much lower. These higher rates in some classifications are made necessary as a matter of underwriting policy, so as to avoid an overloading with undesirable risks.

IV.

Whether State managed insurance is to be regarded as socialistic depends somewhat upon the viewpoint one takes. We look upon it as purely a business proposition in connection with the compulsory insurance provisions of the Workmen's Compensation Law. Where the State compels employers to insure against compensation liability, it seems only fair that the State should afford a medium for providing satisfactory insurance at as near cost as possible.

MONTANA.

I.

Yes, most unqualifiedly. We have a surplus in the fund, representing double the amount of all current liabilities or discounted pensions.

II.

It is our opinion, to make a State Fund Plan of Insurance effective, it should be compulsory, which would require a constitutional amendment in this State. Hence we are not in favor of an attempt to make the State Fund method exclusive; further we are of the impression that the employer should have a range of choice as to the method that he will elect to operate under, providing injured employes do not suffer as a consequence.

III.

The cost to employers under the State Fund Plan is less than one-half of what it is to employers insuring under Casualty Companies; or at least has been for the four years that the law has been in operation.

IV.

Solicitors for insurance companies advise the employer that as his cost is governed by the number and character of the accidents that occur under the plan, which is mutual in its effect, that as subscribers they are signing what they term a "blank check," as they cannot tell until the end of the year what their protection is going to cost them, whereas under the Casualty Company method the rate of premiums is fixed and agreed upon, and hence the employer knows just what his protection will cost. The answer to this is the record, which discloses the fact that the cost to all the employers operating under the State Fund Plan has been less than one per cent of the combined pay roll for each year that the law has been in operation, and, taken for the total time or four years that the law has been in existence, the total cost to employers under the State Fund Plan averages a shade over three-fourths of one per cent of the entire pay roll, while the cost to the employers insuring their compensation risk with the Casualty Companies has not been less than two and a quarter per cent of their pay roll for any one year, and the average cost to all of the employers so insuring for the total time that the law has been in existence averages nearly two and one-half per cent of the total pay roll.

NEW YORK.

I.

Its success has been most impressive. Starting with the Compensation Act, July 1, 1914, it has built up a premium income which this year exceeds $3,000,000, and has assets exceeding $5,000,000. In the face of the violent and unscrupulous competition of a large number of stock and mutual companies, the State Fund has grown strikingly and at the present time has about one-seventh of the compensation business in the State. The annual saving to New York employers insured with the State Fund is approximately $500,000.

II.

At the hearing on bills presented at the last session of the Legislature providing for the prohibition of stock company insurance in workmen's compensation, the manager of the State Fund, with the approval of the commission, appeared and presented an argument for the bill, copy of which I am pleased to send you. This, I think, should

be a satisfactory answer to your inquiry in this respect.

III.

The initial rates of the State Fund at the present time are approximately 15 per cent lower than the rates of the casualty companies. These rates are, of course, subject to reduction by dividends, which for the last policy period will doubtless be not less than 10 per cent. It should be stated that the State Fund did not pay dividends on the business of 1916 and 1917, as the rising cost of compensation, due to unusual business activity and war conditions, made this impracticable. The improvement of the experience during the last year practically assures the resumption of dividend payments on business of the last six months of 1918, as previously stated.

IV.

One of the criticisms frequently urged by the stock companies is that the State Fund coverage is not entirely clear and definite, and that there are conditions in which the employer insured with the State Fund might find himself not covered. They argue this particularly as to the cases where they say the employe might pursue a remedy at common law. As a matter of fact, the Workmen's Compensation Law abolishes liability at common law for employers insured in one of the prescribed ways, and, furthermore, provides that the payment of premiums to the State Fund releases an employer from all liability on account of injuries or death sustained by his employes. The effect of these provisions, however, is not generally understood by employers, and it is possible for brokers and agents of the casualty companies to conjure up arguments about liability outside the Workmen's Compensation Law not covered by the State Fund policy. The State Fund is asking for legislation this year which will specifically authorize it to cover any liability at common law, under the federal statutes, or laws of other States, arising in connection with a compensation risk. This legislation is needed in order to enable the State Fund to meet the arguments of the casualty companies at this point, which, although without actual foundation in fact, have, nevertheless, the practical effect of enabling the companies to hold a considerable volume of business that would naturally go to the State Fund.

Notwithstanding the entire absence either in the statute or the policy of the State Fund of any provision for assessment, the stock companies try to argue that the policy-holders of the State Fund are liable to assessment, and in times past, when the State Fund had a smaller surplus than it has at the present time, this was a point upon which they were able to frighten many employers. We do not believe, in the first place, that there is anything in the argument, and in the second, the surplus of the State Fund is now reaching a point where, even if there were an assessment liability, the argument would really have no weight.

PENNSYLVANIA.

I.

The best reply to the question as to whether our Fund has been successful is to advise you that on June 30, 1918, our general surplus was $634,864 and our catastrophe surplus was $265,225. Our total assets at the same time were $3,551,222. We have in the neighborhood of 20,000 policy holders and insure over 250,000 employes of these policy holders.

II.

This question opens up a broad field, and while, if our Fund was made exclusive, we would save, no doubt, in the neighborhood of $3,000,000 for the employers of the State, this action might be looked upon by our conservative citizens as too much of a socialistic paternal act. My mind is an open one on the subject, but, at the present time, I am perfectly satisfied with the business we are obtaining on a competitive basis.

III.

Our initial rates are 10 per cent less than the Manual rates, and in addition to that we have paid a dividend, each year, of 15 per cent to our commercial policy-holders. In 1916 we paid a 10 per cent dividend to our coal policy-holders; in 1917 a dividend of 5 per cent to our coal policy-holders, and in 1918 a dividend of 10 per cent to our coal policy-holders.

IV.

Owing to the way our law was framed, a State Fund is absolutely necessary in Pennsylvania, because the laws made compensation insurance compulsory to the employers in this Commonwealth (except farmers and housekeepers), and if there was not a State Fund the stock companies could either refuse to carry this class of insurance at all or could make the rates so high

that they would be prohibitive. I do not know of any serious criticism that is being made by any enemies of our State Fund.

Much can no doubt be said *arguendo* in respect to the advantage of state insurance over private insurance of compensation risks, and vice versa; but time and experience will have to disclose which form of insurance is most likely to work out better in the end.

A. H. R.

BAIL—INDEMNIFYING SURETY.

BADOLATO v. MOLINARI.

Supreme Court, Trial Term, Kings County, February 17, 1919.

174 N. Y. Supp. 512.

The theory underlying the principle of cases deciding that there can be no indemnity in favor of a surety on a bail bond, because he virtually becomes accused's jailer, and that government seeks presence of accused, rather than money represented by bond, does not obtain in New York in view of Cr. Code, §§ 586-588, authorizing acceptance of cash bail.

CROPSEY, J. The question is whether the surety on a bail bond for a defendant in a criminal action, who has not been promised indemnity, can recover from the defendant the amount he has been obliged to pay on his bond because of defendant's failure to appear. The bond in question was one to answer, and was executed only by the surety. The defendant did not need to join in it. Cr. Code, § 568.

(1) The general rule is conceded, that a surety may hold his principal on an implied agreement to indemnify, even where there is no express promise. But the claim is that this rule does not apply in the case of sureties on bail bonds given in criminal cases. There are two contentions made as to this: One, that there can be no indemnity upon either an implied or an express contract, as such an agreement is void, being against public policy; and the other, that, even though there may be indemnity provided by an express agreement, no such agreement will ever be implied. It is the latter contention that the defendant here makes. He concedes, apparently, that an express agreement may be enforced.

The question is interesting. A study of it shows considerable conflict in the cases and among the writers. An express agreement for indemnity has been held void, as against public policy. Herman v. Jeuchner, 15 Q. B. Div. 561; U. S. v. Greene (C. C.), 163 Fed. 442; U. S. v. Simmons (C. C.), 47 Fed. 575; Pingrey on Suretyship & Guaranty, §§ 415, 416. But some cases hold that, though the principal may not indemnify his bail, a third party may do so. U. S. v. Greene (C. C.), 163 Fed. 442; People v. Ingersoll, 14 Abb. Prac. (N. S.) 23. Other cases uphold the right to indemnity where there is an express contract, though most of them deny the right on an implied agreement. Stearns' Suretyship, p. 540; Cripps v. Hartnoll, 4 B. & S. 414; U. S. v. Ryder, 110 U. S. 729, 4 Sup. Ct. 196, 28 L. ed. 308; Ewing v. U. S., 240 Fed. 241-252, 153 C. C. A. 167; Simpson v. Robert, 35 Ga. 180; Carr v. Davis, 64 W. Va. 552, 63 S. E. 326, 20 L. R. A. (N. S.) 58, 16 Ann. Cas. 1031; Ellis v. Norman, 19 Ky. Law Rep. 1798, 44 S. W. 429; Maloney v. Nelson, 12 App. Div. 545, 42 N. Y. Supp. 418, affirmed 158 N. Y. 351-355, 53 N. E. 31. Still other cases hold that a recovery may be had, though there be no express agreement—the implied agreement being held to exist as in the usual case of principal and surety. Petersdorff on Bail, pp. 516, 517; Reynolds v. Harral, 2 Strob. (S. C.) 87; Fagin v. Goggin, 12 R. I. 398; Harp v. Osgood, 2 Hill, 216-219; Brandt on Suretyship & Guaranty (3d ed.) § 610. Though one case at least holds that an implied agreement will be enforced if the surety furnished cash bail, but not if he executed a bond. Hutchinson & Co. v. Morris, 86 Mo. App. 40.

The principle underlying the cases which hold there can be no indemnity is that under the theory of bail in those jurisdictions the bondsman becomes virtually the accused's jailer, and so the government has a double security for his disappearance; that the government seeks the presence of the accused, rather than the amount of money represented by the bail bond, and to permit the surety to be indemnified would destroy his incentive to produce the defendant. And so it is not surprising to find that express agreements of indemnity have been held to be void, where they were made on the understanding that the principal would escape and would not stand trial. Dunkin v. Hodge, 46 Ala. 523; Ratcliffe v. Smith, 13 Bush (Ky.) 172.

But these reasons, if sufficient to justify the holding that no implied agreement of indemnity could be enforced, should likewise require

the holding that an express agreement was void. There seems to be no reason for treating the one situation differently from the other. If the right to indemnify the bail is recognized as unobjectionable, and not in contravention of public policy, there should be no reason for holding such an agreement to be valid if based upon an express contract, but void if based upon an implied contract. The manner in which the contract was created must be immaterial. If it is not against public policy to agree to indemnify bail, it cannot be against public policy to imply that such an agreement was made. If the law honors itself in enforcing an express contract, it should not stultify itself by refusing to enforce an implied contract, which would accomplish exactly the same result.

(2, 3) The theory of bail in the jurisdictions in which decisions have been rendered declaring either express or implied contracts of indemnity, or both, to be void, does not exist in this state. Under the common law cash could not be accepted as or in lieu of bail. It is acceptable only when authorized by statute. Bishop's New Criminal Procedure (2d ed.), vol. 1, § 264; 6 C. J. 1023; Eagan v. Stevens, 39 Hun, 311; McNamara v. Wallace, 97 App. Div. 76, 89 N. Y. Supp. 591. In the jurisdictions referred to cash bail could not be accepted. Nor was it authorized in this state before the adoption of the Criminal Code in 1881. Such a provision was contained in the proposed Code of Criminal Procedure prepared in 1850 by Mr. David Dudley Field (see sections 648-650), but it was not enacted until more than 30 years thereafter. See sections 586, 587, 588, Cr. Code. Under these provisions the theory of bail that existed in jurisdictions which did not permit of the deposit of cash as bail does not apply.

The accused himself may deposit cash and secure his release, and so the state does not look to the obligation of some third party as bail to produce the accused. As the court said in Moloney v. Nelson, 158 N. Y. 351, at page 355, 53 N. E. 31, at page 32:

"It is the loss of the money deposited, or the assurance that the sureties will be obliged to pay the amount of the bail, that is relied upon to secure the presence of the accused. It therefore cannot be said to be a part of the public policy of this state to insist upon personal liability of sureties, for there need not be such personal liability in any case if the accused make a deposit of money in lieu of bail, as provided by the statute."

And the United States Supreme Court seems to have accepted this view of the matter. In Leary v. United States, 224 U. S. 567, at page 575, 32 Sup. Ct. 599, at page 600 (56 L. ed. 889, Ann. Cas. 1913D, 1029), that court said:

"Bail no longer is the mundium, although a trace of the old relation remains in the right to arrest. Rev. St. § 1018. The distinction between bail and suretyship is pretty nearly forgotten. The interest to produce the body of the principal in court is impersonal and wholly pecuniary."

(4) That bail might be indemnified, and even be paid, for executing the bond, was expressly recognized in this state by the addition in 1912 of section 577a to the Criminal Code, allowing surety companies to give bail.

It follows that in this state a bondsman for an accused in a criminal action may recover from the accused upon an implied agreement of indemnity the amount he has been obliged to pay because of the latter's failure to appear. The plaintiff is entitled to judgment for the amount stipulated, with costs.

NOTE.—*Indemnity to Surety on Bail Bond.*—In th ecase of Carr v. Davis, 64 W. Va. 522, 63 S. E. 326, 20 L. R. A. (N. S.) 58, the court said: "The question is: Is the bond of indemnity valid so far as to create an enforceable demand in favor of Carr (surety in a bail bond for felony). It is said that the bond is void as against public policy in this: That it tends to make the bail less watchful to prevent the escape of the accused from trial than he would be if not indemnified; that, if not indemnified, the bail would keep strict watch on the accused, and, on suspicion of escape, to save himself from loss, would arrest the accused and return him to prison to stand trial; but, being indemnified, he does not care."

After noticing that the states are divided on the question, the court leans to the idea that public policy is not violated, because "The law allows bail. We may say that the law favors bail as a relief from prison in cases where bail is grantable, and it would tend to defeat this merciful provision of law if we should adopt the harsh rule that a man perhaps innocent, cannot use his property to indemnify his friends to relieve him from prison bars. We do not see that the matter is so far against public policy as to impel us to adopt so severe a rule."

Two of the five members of the court dissented. One of the dissentients said: "The primary object of a bail bond in a criminal case is not to secure to the state the payment of the penalty in the bond, but the presence of the prisoner, that he may receive the judgment of the court on his guilt or innocence, and, if guilty, the punishment which the law imposes." The other dissentient said: "The poorest person, if honest, can find bail. The richest man, for whom those knowing him would not vouch instant indemnity, should not be permitted to furnish bail by virtually purchasing it. The mere fact that indemnity is furnished indicates that confidence is not reposed. Bail is a matter of confidence and personal relation." So it seems that argument

pro and *con* may run as to this thing, but back of all thought in regard to an accused seeking bail lies the presumption of innocence of an accused and certainly the state has no desire to punish an innocent man, but when he is accused there needs to be solicitude in his behalf until the presumption of innocence may be overcome.

In Maloney v. Nelson, 158 N. Y. 351, 53 N. E. 31, it was said that indemnifying bail is not against public policy. The case alludes to a supposed distinction between indemnity given by an accused and that given by another for his benefit, but the New York court thinks it not a valid distinction.

In United States v. Simmons, 47 Fed. 575, 14 L. R. A. 78, it was held that persons who have been indemnified by the accused should not be accepted pending his appeal from a judgment of conviction. In reasoning the court makes reference to United States v. Ryder, 110 U. S. 729, 28 L. ed. 308, where it was held that sureties on a forfeited bail bond were not entitled to be subrogated to the rights and remedies of the government, as this would relieve them of the motives to exert themselves in securing the appearance of their principal. This, it is said, fairly leads to the conclusion that when one has been convicted, the same sureties for his appearance for trial, should not be allowed to intervene further in his behalf. It may be thought that, the presumption of innocence having been displaced, the accused stands with the presumption the other way. There arises, then, a special situation as to the accused and his sureties. Efforts by him then are to escape a penalty by the exercise of a privilege, rather than a right he enjoys—namely, the privilege of appeal. One exercises a privilege *cum onere;* a right is absolute.

Somewhat on this line is the question of a deposit of cash to stand as bail.

It has been ruled in many states that there must be a statute to authorize the deposit. Butler v. Foster, 14 Ala. 323; Swart v. Cason, 62 Kan. 100, 61 Pac. 402; Snyder v. Gross, 69 Neb. 345, 95 N. W. 636, 5 Ann. Cas. 152; Reinhard v. Columbus, 49 Ohio St. 257, 31 N. E. 35.

And where a statute authorizes a deposit in cash by an accused, this does not authorize a third person to make this for him. State v. Anderson, 119 Iowa 111, 94 N. W. 208.

If a deposit is made by another than the accused and there is no authority to accept cash bail at all, the deposit may be recovered, even though forfeiture has been declared. Brasfield v. Milan, 127 Tenn. 561, 155 S. W. 926, 44 L. R. A. (N. S.) 1150. To the same effect in principle is Smart v. Cason, 50 Ill. 195; Casper v. Rivers, 95 Miss. 423, 48 So. 1024.

It is somewhat difficult to distinguish cash deposit cases from one securing his liberty through indemnified sureties. If it is merciful to accept one, it is merciful to allow the other. But it is perceivable that it may be claimed that forfeiture proceedings generally provide only for judgment on bail bonds and, therefore, they exclude forfeiture of property as standing in the place of a bond. C.

ITEMS OF PROFESSIONAL INTEREST.

BAR ASSOCIATION MEETINGS FOR 1919—WHEN AND WHERE TO BE HELD.

American—New London, Conn., September 3, 4, 5.
Arkansas—Hot Springs, May 31, June 1.
Hawaii—Honolulu, May 29.
Georgia—Tybee Island, May 30, 31.
Illinois—Decatur, May 28, 29.
Kentucky—Lexington, June 26, 27.
Louisiana—Baton Rouge, May 16, 17.
Maryland—Atlantic City, N. J., June 26, 27, 28.
Michigan—Ann Arbor, June 20, 21.
New Jersey—Atlantic City, June 13, 14.
North Carolina—Greensboro, August 12, 13, 14.
Pennsylvania—Bedford Springs, June 24, 25, 26.
South Carolina—Tybee Island, May 30, 31.

CORRESPONDENCE.

MEETING OF THE ILLINOIS BAR ASSOCIATION.

Editor, Central Law Journal:

The next meeting of the Illinois State Bar Association will be held at Decatur, May 28 and 29. Senator Spencer of Missouri will deliver the annual address upon the subject of "Post War Problems" on the 29th. The afternoon of the 28th will be devoted to the lawyer's needs in the new Constitution of the State and the annual dinner will be held on Wednesday evening, May 28. Further details of the program have not been decided, but we will keep you in mind and send you the same as soon as they are completed.

Yours very truly,

R. ALLAN STEPHENS.

Danville, Ill.

ORIGIN OF THE UNIFORM NEGOTIABLE INSTRUMENTS LAW.

Editor, Central Law Journal:

In connection with what I stated to you about the origin of the uniform negotiable instruments law, I am enclosing you a sample of the circular letter referred to by me as sent out to all the bar associations of the United States in August, 1886. Your bar library in

St. Louis or your library probably contains a copy of the transactions of the State Bar Association of Alabama for the year 1886. In those transactions you will find the report of the committee on correspondence, signed by me, as chairman, with a verbatim copy of the English Bills of Exchange Act. The Boston Book Company, when applied to for a copy, replied to me that none were to be had in the United States, and imported an official copy from England for me. That official copy was used by the printers to set up the type for the report of the State Bar Association for the year 1886. It is now in my possession and retained by me as part of the history of the origin of the negotiable instruments law now the law of this country.

FREDERICK G. BROMBERG.

Mobile, Ala.

[We are pleased to secure this bit of history concerning the origin of the Uniform Negotiable Instruments Law. The letter referred to by our correspondent was sent under date of August 20, 1886, by "The Committee on Correspondence of the Alabama State Bar Association" and was addressed to the secretary of each state bar association in the country. This letter contains the following references to the Uniform Negotiable Instruments Law, towit:

"At the December (1881) meeting of the Alabama State Bar Association, there was created a Committee on Correspondence, whose duty is to correspond with officers and committees of other Bar Associations, for the purpose of causing concerted action of the same relative to law questions of National importance.

The most direct way of accomplishing the desired uniformity would be, apparently, by amendments to the National Constitution, conferring the necessary powers upon the Congress to legislate upon these subjects.

The practical difficulties in the way of attaining amendments are so great, however, as, if resorted to, to result in indefinitely postponing the uniformity.

It seems, therefore, preferable to confine our efforts to securing uniformity in law questions of National importance to independent State action, and to attack the questions separately, beginning with that, respecting which the nearest concurrence already exists.

That fulfilling the latter conditions, seems to be the law of negotiable instruments, which can be, probably, rendered harmonious throughout the States with less difficulty than any other.

It has the advantage, also, of being that branch of law in which the whole commercial world is interested, irrespective of National boundaries, and of having extra territorial effect, through the fact that the larger part of the world's commercial transactions are based upon credit, and commence and end not only in different jurisdictions, but also in different nationalities.

The fact that England has a code and is the financial centre of the world suggests, that it is desirable to have any proposed uniform law of negotiable instruments, uniform with that of England. Whilst striving to attain uniformity in the States, we can as easily, at the same time, attain uniformity with England. If we do this, our task will be comparatively easy. The new English code need be changed only in formal matters to become a model for us.

This committee suggests, that it be recommended for adoption to the Legislatures of the respective States. This code is known as the 'Bills of Exchange Act of 1882.'

The following were the members of the committee:

Frederick G. Bromberg, Chairman, Mobile, Ala.; Harry Pillans, Mobile, Ala.; Z. M. P. Ingre, Mobile, Ala.; John F. White, Selma, Ala.; A. D. Sayre, Montgomery, Ala.

ED."].

HUMOR OF THE LAW.

The prisoner faced the judge in a New Orleans Court:

"How many times have you been here before?"

"Never, sir," answered the man.

"But your face is so familiar."

"I tend bar across the street from the St. Charles, sir," replied the prisoner.

"You can knock a thing in such a way as to boost it," said Attorney General Gregory in an address in Washington. "Injudicious orators often make this mistake.

"Perhaps you've heard of the revivalist who shouted:

"'I tell you, friends, hell contains nothing but chorus girls, cocktails and roulette wheels." Thereupon, a young man in a back seat yelled:

"'Oh, death, where is thy sting?'"

While sea-fishing with a friend off Osprey, Florida, Dr. Marshall D. Ewell, the noted handwriting expert of Chicago, lost his sinker. Rather than cut the day's fishing short, he hit upon the happy idea of utilizing his flask which unfortunately was found to be empty. The bottle was filled with water, carefully corked, and sent down on its mission. A few minutes later the doctor was lucky enough to pull up a pair of whiting, one on each hook.

"Ha, doctor!" exclaimed the companion; "twins this time!"

"Yes," replied the doctor, with a smile, "and brought up on the bottle, too!"

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Arrest** — Justification.— While an officer may arrest for a felony without warrant he may not so arrest arbitrarily, and it is indispensable to a justification of arrest of one actually innocent, that the circumstances were such that a person of ordinary ability would have believed that the party was guilty.—Castle v. Lewis, U. S. C. C. A., 254 Fed. 917.

2. **Banks and Banking**—Consideration.—There is no failure of consideration for note executed by defendant to plaintiff bank for money loaned, with which to buy stock, however valueless the stock, though the money was paid out therefor by plaintiff's cashier; he in such transaction being defendant's accredited agent.—Clardy v. American Trust & Savings Bank, Tex., 208 S. W. 990.

3. **Bills and Notes**—Indorser.—The obligation of an indorser of a note is secondary and conditional, and he only agrees that he will pay the amount of note if maker does not, and upon proper notice at which time his obligation becomes fixed.—Farmers' & Merchants' Bank v. Davies, La., 80 So. 713.

4.——Joint and Several.—Note, joint and several in form, reading, "We or either of us promise to pay," and "The drawee and indorsers severally waive presentment for payment," signed by a company and by defendant, designated as "President," was note of defendant as well as of company, though given in renewal of prior note of company alone.—Bayh v. Hanna, Ind., 122 N. E. 7.

5.——Want of Consideration.—Where a note is given by one who has been discharged in bankruptcy as a substitute for a note so discharged, in order that a bank to whom it is given may fraudulently show it to the bank examiner as an asset, the bank's receiver may recover thereon against the maker, notwithstanding want of consideration.—Niblack v. Farley, Ill., 122 N. E. 160.

6. **Brokers**—Exclusive Agency.—In action by brokers to recover of defendant broker half commission for having disclosed name of purchaser for property of which he was exclusive agent, instruction that, if jury found plaintiffs contracted with defendant for half commission, it was not necessary for them to have produced signed purchase contract, even though they endeavored to, held proper and necessary to keep the real issue before jury.—Baker v. Bakewell, Mo., 208 S. W. 844.

7.——Procuring Cause.—Efforts of a broker to entitle him to a commission must have been the efficient or procuring cause of the transaction relied on by him.—Brooks v. Geo. Q. Cannon Ass'n, Utah, 178 Pac. 589.

8. **Burden of Proof**—Confidential Relation.—Where confidential relation exists, and voluntary conveyance beneficial to grantee is made, the burden of proof is on the person benefited to show grantor acted freely and voluntarily.—Bacon v. Dabney, Ky., 208 S. W. 807.

9. **Champerty and Maintenance**—Contract.—A contract by which the amount of an attorney's fee was fixed at one-third of the amount recovered, costs to be paid by attorney, was not champertous.—Wood-Heck v. Roll, Ky., 208 S. W. 768.

10. **Charities**—Trustees.—Conveyance to the trustees of a named church are not void, though the grantees were not incorporated, and all of the members of the congregation became beneficiaries of the property conveyed.—Illinois Classis of Reformed Church in the United States v. Holben, Ill., 122 N. E. 46.

11. **Compromise and Settlement**—Partial Performance.—Partial performance of an agreement of compromise makes the agreement an effective extinguishment of the antecedent obligation; the only thing remaining to be done being capable of performance, and merely relating to an incidental provision as to appraisement of land to be conveyed.—Armstrong v. Sacramento Valley Realty Co., Cal., 178 Pac. 516.

12. **Contracts**—Consideration.—A consideration of some sort is so absolutely necessary to form a contract that an agreement to do or pay anything on one side without compensation on the other is totally void, and performance thereof cannot be compelled.—South Park Com'rs v. Chicago City Ry. Co., Ill., 122 N. E. 89.

13.——Intoxication.—One obtaining signature of one sick and intoxicated and wholly bereft of reason or understanding, with knowledge of such condition, was guilty of constructive fraud.—Deasy v. Taylor, Cal., 178 Pac. 538.

14.——Merger.—The doctrine that all prior negotiations are merged into a written contract does not apply where the contract is induced by fraud.—Marker v. Outcault Advertising Co., Ind., 122 N. E. 32.

15.——Unlawful Purpose.—If a part of an agreement is to use the subject-matter or a part of it for an unlawful purpose, the contract is void.—Bonnie & Co. v. Blankenship, Tex., 208 S. W. 934.

16. **Corporations**—Pledges.—Where the sheriff, under an order of sale issued out of the district court, sold certain pledged shares of the capital stock of a corporation, the sale transferred the ownership of the stock.—Safford v. Tibbetts, Kan., 178 Pac. 618.

17.——Promoter.—One transferring a coal lease pursuant to contract with promoters, accepted by corporation when organized, in consideration of fully paid stock representing a "one-fifth interest in the property fully equipped" for producing coal, under circumstances of case, held entitled to stock equaling one-fifth of value of property when fully equipped with all necessary machinery, tracks, etc., to successfully operate.—Wallace v. Eclipse Pocahontas Coal Co., W. Va., 98 S. E. 293.

18.——Promissory Note.—If a note executed to foreign corporation is void because of corporation's failure to obtain license to do business in state as required by statute, note is unenforceable in hands of indorsee.—German-American Bank v. Smith, Mo., 208 S. W. 878.

19. **Covenants**—Restrictions.—That a plat, showing dotted lines, designated "building lines," is recorded, does not establish a building restriction, to which all lot owners in the subdivision must conform, since such restriction can only be imposed by a restrictive covenant in express words.—O'Malley v. Smith, Mo., 208 S. W. 849.

20.——Restrictions.—Where use of building other than as one family residence was prohibited by restrictive covenant, the fact that the building could be torn down and a new one constructed in its place to which the covenant did not apply did not make covenant futile.—Booth v. Knipe, N. Y., 122 N. E. 202.

21. **Criminal Law**—Expert Witnesses.—The jury need not surrender their judgment to the opinions of scientific witnesses, but their testimony should have with the jury whatever influence it would have with intelligent and impartial minds; the weight of opinions of expert witnesses being always for determination of jury from all circumstances.—People v. Harvey, Ill., 122 N. E. 138.

22.——Intent.—Where a specific intent is not an element of the crime, it is not always necessary that a criminal intent should exist.—People v. Fernow, Ill., 122 N. E. 155.

23.——Second Violation.—A finding of guilty, as charged under a count charging a second violation, is a sufficient finding of conviction of a former offense, at least in absence of application for special finding or objection at the time.—Lakomy v. People, Col., 178 Pac. 571.

24.——Variance.—Defendants by motion to exclude evidence on theory of a variance and by securing favorable action thereon estopped themselves to plead that trial and judgment as a former jeopardy in a trial upon an indictment for the crime shown by such proof.—Mitchell v. State,, Ala., 80 So. 730.

25. **Damages**—Exemplary.—Exemplary damages may not be recovered unless actual damages are alleged and proven.—Kieschnick v. Martin, Tex., 208 S. W. 948.

26. **Death**—Survival of Action.—Right of action simultaneous with injury to her accrued to plaintiff's intestate as a person in being, and her subsequent death did not defeat it, but by operation of law vested it in plaintiff as her personal representative; continuance of life after accident, and not insensibility or want of consciousness, determining whether cause of action survives.—Battany v. Wall, Mass., 122 N. E. 168.

27. **Deeds**—Recording.—Where a properly executed deed, purporting on its face to have been delivered, is recorded, a presumption of delivery arises.—Garnett v. Royal Ins. Co., Ga., 98 S. E. 363.

28.——Separate Covenant.—Covenants in a deed are no part of the conveyance, but separate contracts, and title passes independently of them.—Doak v. Smith, Ark., 208 S. W. 795.

29. **Divorce**—Reconciliation.—Reconciliation terminates a divorce action, and the allowance for temporary alimony falls therewith, as also any unexpended balance of suit money, and the wife's attorneys cannot recover compensation unless by private and separate recovery from her, but an allowance fixed by court order is presumed earned.—Yoder v. Yoder, Wash., 178 Pac. 474.

30. **Dower**—Law of Place.—Surviving wife's right to dower is determined by the law of the place where the land is situated.—Perry v. Wilson, Ky., 208 S. W. 776.

31. **Eminent Domain**—Description of Property.—A petition to condemn the land for the use of a railroad is the basis of the proceeding and must accurately describe the tract sought to be condemned.—Dailey v. Missouri Pac. Ry. Co., Neb., 170 N. W. 888.

32. **Equity**—Vexatious Litigation.—A court has inherent power to protect itself and litigants against harassing and vexatious litigation and abuse of process of court by the summary dismissal of a suit brought to relitigate matter finally and conclusively determined and in violation of the court's injunction.—Patterson v. Northern Trust Co., Ill., 122 N. E. 55.

33. **Exemptions**—Partnership.—A member of a partnership who is the resident head of a family cannot hold his interest in the partnership property exempt from execution to satisfy partnership debts.—Jensen v. Wiersma, Iowa, 170 N. W. 780.

34. **Fish**—Non-navigable Stream.—The owner of land adjoining a non-navigable stream is the owner of the fishing rights to the center of the thread on his side of the stream, and if one proprietor owns the land on both sides of the stream, he has the exclusive right of fishing therein.—Thompson v. Tennyson, Ga., 98 S. E. 353.

35. **Fraud**—False Representations.—Vendor's false representations as to easements or appurtenances affecting value of land, made with intention to deceive, and which deceived, purchaser to his injury and induced him to purchase property for more than its value, gave him a right of action for deceit, when falsity of representations could not be ascertained by examination of premises.—Waldon v. Stokes, Ga., 98 S. E. 367.

36. **Frauds, Statute of**—Oral Contract.—Oral contracts relating to the sale of land are not inherently illegal, and the parties thereto may perform them if they are willing to do so.—Vaught v. Jonathan L. Pettyjohn & Co., Kan., 178 Pac. 623.

37. **Fraudulent Conveyances**—Constructive Fraud.—A bona fide sale of personalty in payment of a debt was constructively fraudulent to extent of difference between debt and reasonable value of property, where creditor knew debtor was insolvent and debt was much less than value of property.—Watson v. Schultz, Tex., 208 S. W. 958.

38.——Estoppel.—Where a father sold mules and horses to his son, and the son immediately took possession thereof, exercised control over them, listed them as his own for taxation, though the parties lived together, there was a sufficient change in possession so that creditors of the father could not attack the sale as fraudulent.—Rowan v. U. S. Fidelity & Guaranty Co., Wash., 178 Pac. 473.

39.——Preference.—The right of a creditor to procure preferment from an insolvent debtor obtains in the wife of the judgment debtor to the same extent as in any other creditor.—Reed v. Tilton, N. J., 105 Atl. 597.

40. **Gifts**—Inter Vivos.—Under Civ. Code, § 1147, the donor in a gift inter vivos must do something on making the gift which places in the hands of the donee the means of obtaining possession of the subject of the gift, and it is not enough that the donee then have means of obtaining possession.—Adams v. Merced Stone Co., Cal., 178 Pac. 498.

41. **Homestead** — Exchange of Property. — Where judgment debtor owning rural homestead traded for city property for purpose of changing her home from country to town, and consummated this intent by moving into town house three to five days after exchange of deeds, she could claim her homestead exemption as against execution levied upon town property between time of exchange of deeds and time of moving. —Dyer Trading Co. v. Harrison, Ark., 208 S. W. 794.

42. **Homicide**—Voluntary Intoxication.—Voluntary intoxication is to be considered by jury in a prosecution for murder, in which a premeditated design to effect death is essential, with reference to its effect upon defendant's ability at the time to form and entertain such a design.—Tubby v. State, Okla., 178 Pac. 491.

43. **Injunction**—Negative Covenant. — Injunction is the proper remedy to enforce negative covenant not to engage in competing business. —Feenaughty v. Beall, Ore., 178 Pac. 600.

44. **Insurance**—Assignment.—An insured cannot affect rights of beneficiary to proceeds by assigning policy, although he has reserved right to change beneficiary; and assignment not complying with the requirements for effecting a change of beneficiary.—Anderson v. Broad Street Nat. Bank, Trenton, N. J., 105 Atl. 599.

45.——Contract.—Where insurance agent contracted to act exclusively for principal and to devote his entire time to agency, principal was justified in terminating contract, where agent entered into employment of a rival company. —Locher v. New York Life Ins. Co., Mo., 208 S. W. 862.

46.——Reforming Policy.—Failure of insured to read the policy and thus discover its omission to state that building stands on leased ground and that property is incumbered by chattel mortgage, so as to prevent invalidity of policy, is not such negligence as will bar suit to reform policy.—Giammares v. Allemania Fire Ins. Co., of Pittsburgh, Pa., N. J., 105 Atl. 611.

47.——Waiver.—Insurer, by accepting premium knowing that insured was not in good health at the time, waived provision of policy providing that policy should not be binding until first annual premium is paid during good health of insured.—Farmers' Nat. Life Ins. Co. v. Hale, Ind., 122 N. E. 19.

48. **Intoxicating Liquors**—Nuisance.—A state has the right to provide regulations for abatement as a common nuisance of property used for manufacture and sale of intoxicating liquors. —Mack v. Westbrook, Ga., 98 S. E. 339.

49. **Justices of the Peace**—Appeal.—Where the transcript on appeal from justice's court has not been filed within the prescribed time, the appeal has not been perfected, and, if the delay is not explained or excused, the case will be dismissed on motion seasonably made.— Piquero & Smith v. Carlin, Tex., 208 S. W. 956.

50.——Tort.—In action in tort in justice court, where amount claimed in summons was $200, with interest, the interest commenced from date of summons and not from the date of tort, so that amount in controversy did not exceed $200, and justice court had jurisdiction.—Jorgenson v. Farmers' & Merchants' Bank of Robinson, N. D., 170 N. W. 894.

51. **Landlord and Tenant**—Abandonment.— Where a lessee abandoned premises, lessor, taking possession to protect property, is not precluded from recovering rent for remainder of term as it becomes due under the lease, by clause therein that on breach of any covenant by lessee the lessor might re-enter and end the term.—Hickson v. Barton, Fla., 80 So. 745.

52.——Merger.—Ordinarily the purchase by a lessee of the interest of the lessor during the existence of the lease merges the two estates.— Rayburn v. Stewart-Calvert Co., Wash., 178 Pac. 454.

53.——Notice.—Renewal clause in lease, providing that tenant must give notice within 30 days before the termination of the lease, or the landlord may declare it renewed for another year, having been inserted by the landlord, and without the tenant's knowledge, must be most strictly construed against the landlord.—Levering Inv. Co. v. Lewis, Mo., 208 S. W. 874.

54. **Larceny**—Separate Taking.—There may be two separate and distinct unlawful takings of property, so as to make two separate offenses. —Gardner v. State, Tex., 208 S. W. 920.

55. **Limitation of Actions** — Amendment. — Amended counts, filed after expiration of period of limitations, setting out new cause of action different from that stated in original counts, are barred by limitations.—Milauskis v. Terminal R. Ass'n of St. Louis, Ill., 122 N. E. 78.

56.——Mutual Account.—A payment, whether it be of money or any article of personal property of stipulated value, made on account, would not make the account a "mutual account," within the meaning of four-year statute of limitations. Code Civ. Proc. § 337.—Shuler v. Corl, Cal., 178 Pac. 535.

57. **Logs and Logging**—Growing Timber.— Growing timber is part of the realty, and consequently a deed to growing timber conveys an estate in praesenti.—Anderson v. Palladine, Cal., 178 Pac. 553.

58. **Master and Servant**—Fellow Servant.— Since common-law fellow servant rule no longer prevails as to railroads, the negligence of engine switchman resulting in death of field switchman would be negligence of both defendant railroad and the engine switchman.—Briscoe v. Chicago & A. R. Co., Mo., 208 S. W. 885.

59.——Joint Action.—In an action by a passenger against a carrier, its employes, and a Pullman Company for being left at the station when intending to board, it was not improper to return a verdict and to enter judgment for a larger amount against the carrier than against its servants.—Spigener v. Seaboard Air Line Ry., S. C., 98 S. E. 330.

60.——Fellow Servant.—Operators of cars in a coal mine are not fellow servants of other employes of the same master operating other cars therein, whether such cars be hauled by mules or otherwise.—R. C. Tway Mining Co. v. Tyree, Ky., 208 S. W. 817.

61.——Safe Place.—If master was negligent in failing to provide a safe place of work, he would be responsible if it caused injuries to servants, notwithstanding that negligent act of a fellow servant might have contributed to injuries also as a proximate cause.—Harwell v. Columbia Mills, S. C., 98 S. E. 324.

62. **Monopolies**—Conspiracy.—It was a "conspiracy against trade" under St. 1907, p. 984, for wholesale bakers to enter into an agreement, whereby they fixed the retail price of bread to be sold by them to retailers, and agreed not to sell to any retailer who did not maintain such price.—People v. H. Jevne Co., Cal., 178 Pac. 517.

63. **Mortgages**—Crops.—A provision in mortgage, "together with all and singular the profits, privileges, and advantages, with the appurtenances to the same belonging, or in any wise appertaining," did not give a mortgagee a lien on crops after cutting.—Ahern v. Littl, N. J., 105 Atl. 597.

64. **Municipal Corporations** — Governmental Function.—City, in conducting summer camp, under charter provisions, for maintaining health of children of city, held engaged in governmental function, though making small charge to help pay costs, so that it was not liable for negligence injuring boy at camp.—Kellar v. City of Los Angeles, Cal., 178 Pac. 505.

65.——Right of Way.—Where a collision occurs between automobiles on a city street, presumption is against party who is on wrong side of street.—Columbia Taxicab Co. v. Roemmich, Mo., 208 S. W. 859.

66. **Navigable Waters**—Meander Lines.—Meandered lakes belong to the state in its sovereign capacity in trust for the public.—In re County Ditch No. 34, Minn., 170 N. W. 883.

67. **Negligence** — Inherent Danger. — The manufacturer of products which in their nature are not inherently dangerous in use when free from defects owes no duty to exercise any care in their manufacture for the safety of persons with whom he has no privity of contract. —Travis v. Rochester Bridge Co., Ind., 122 N. E. 1.

68. **Novation**—New Contract.—To constitute a "novation" there must exist a previous valid obligation, an agreement of all the parties to the new contract, validity of the new contract, and extinguishment of the old contract by substitution of the new one.—District Nat. Bank of Washington v. Mordecai, Md., 105 Atl. 586.

69.——Primary Liability.—Where plaintiffs sued to recover on an agrement whereby appellant assumed a debt of another and became primarily liable, the suit itself is a sufficient acceptance by plaintiffs of the assumption.—Snyder v. Slaughter, Tex., 208 S. W. 974.

70. **Partnership**—Entity.—While a partnership is not recognized as an entity, yet partnership contracts and undertakings are determined and adjusted under the rules of law and equity governing that relation.—Snyder v. Slaughter, Tex., 208 S. W. 974.

71.——Intention.—Where the question of partnership vel non is to be determined between the parties to a contract, the main inquiry should be directed to the ascertainment of their real intention.—Amacker v. Kent, La., 80 So. 717.

72. **Patents**—Specifying Claim. — The rule that an element expressly specified in one claim of a patent should not be read into another in which it is not specified is intended to apply only where such element alone differentiates the two claims.—Jones v. General Fireproofing Co., U. S. C. C. A., 254 Fed. 970.

73. **Physicians and Surgeons** — Reasonable Care.—A physician or surgeon is answerable for injury to his patient resulting from want of requisite knowledge and skill, or from omission to use reasonable care and diligence in treatment or diagnosis.—Stevenson v. Yates, Ky., 208 S. W. 820.

74. **Principal and Agent**—Liability of Principal.—A person is bound, not only by all acts of agent within scope of actual authority, but also by those within apparent scope of authority, though beyond actual authority.—Crossett Lumber Co. v. Fowler, Ark., 208 S. W. 786.

75.——Scope of Authority.—Principal's authorizing a salesman to submit to the principal for rejection or allowance claims of credit made by customers does not clothe the agent with apparent authority to allow credits.—Butler v. Marsh, Col., 178 Pac. 569.

76. **Release**—Satisfaction. — Where several commit a tort, each is liable for whole damage, and separate judgments may be recovered against each, although only one satisfaction can be had, but injured party may receive a part compensation from one joint wrongdoer, reserving right to demand balance from others, without releasing such others.—Funk v. Kansas City, Mo., 208 S. W. 840.

77. **Sales**—Acceptance of Offer.—The seller's offer must be accepted by the buyer unequivocally, unconditionally, and without variance of any sort.—Pennsylvania Fire Ins. Co. v. Sorrells, Ga., 98 S. E. 358.

78.——Implied Warranty.—Manufacturers' and packers' implied warranty that food is fit for human consumption is not for the benefit of the retailer, who purchases in large quantities for resale.—Dothan Chero-Cola Bottling Co. v. Weeks, Ala., 80 So. 734.

79. **Subrogation**—Liens. — Where building contract required contractor to furnish all material and to refund to owner any money he might be compelled to pay in discharging liens, the owner who paid liens was subrogated to right of materialmen to recover on contractor's bond.—Karel v. Basta, Neb., 170 N. W. 891.

80. **Tenancy in Common**—Color of Title.—A deed of the interest of a tenant in common, executed under a judicial proceeding which purports to sell and convey the whole estate, constitutes color of title, and 7 years' adverse possession thereafter by the grantee bars the cotenants who were not parties to the proceedings where the deed was given.—Alexander v. Richmond Cedar Works, N. C., 98 S. E. 312.

81. **Trusts**—Express Trust.—An express trust in lands cannot be shown by parol under the statute of frauds.—Orear v. Farmers' State Bank & Trust Co., Ill., 122 N. E. 63.

82.——Fiducial Duty.—Where a just and proper discharge of a trust or of the fiducial duties of the trustee are interfered with by reason of hostility between the trustor and trustee, or a change in trustees becomes advisable because the trust is not being properly conducted, such change can be made by the court.—Smallwood v. Lawson, Ky., 208 S. W. 808.

83.——Resulting Trust.—To establish a "resulting trust," it must be shown that the money of one person has been invested in land and the conveyance taken in the name of another. —Katzin v. Wiegand, Ill., 122 N. E. 97.

84.——Spendthrift Trust.—"Spendthrift trusts" are created to provide a fund for the benefit of another, and at the same time secure it against his own improvidence or incapacity for self-protection.—Newcomb v. Masters, Ill., 122 N. E. 85.

85. **Vendor and Purchaser**—Parol Purchase.—Where vendor in possession of unsurveyed and unpatented public land sells land by parol sale and purchaser takes possession and claims under parol purchase and remains in possession, vendor upon acquiring title from the commonwealth could not eject purchasers without first adjusting their equities.—Sizemore v. Davidson, Ky., 208 S. W. 810.

86. **Waters and Water Courses**—Prior Appropriation.—A person appropriating water on the public domain by means of a well sunk in the ground is entitled to use the same as against a subsequent patentee of the land, and that, too, where it is water percolating into the well as contradistinguished from water flowing in well-defined channels.—Stookey v. Green, Utah, 178 Pac. 586.

87.——Servient Land.—If the conformation of land is such that the surface water uniformly follows a definite course within reasonable limits as to width and is discharged upon servient land at a definite place, the line of flow is a "water course."—Winhold v. Finch, Ill., 122 N. E. 53.

88. **Wills**—Children.—A testator is presumed to have used the word "children" in a bequest in its strict and ordinary meaning, unless the context of the will or surrounding circumstances show a contrary intent.—Day v. Webler, Conn., 105 Atl. 618.

89.——Postponing Enjoyment.—It is within the power of a testator to make a bequest of money directly to a legatee without the intervention of trustees, postponing the time of payment, or giving discretion to the executors to pay the legacy in partial payments at such times as they might deem proper.—Coyle v. Donaldson, N. J., 105 Atl. 605.

90.——Testamentary Capacity.—The test of testamentary capacity is whether testator had sufficient mind and memory to remember who were the natural objects of his bounty, and to recall to mind his property and make disposition thereof understandingly according to some plan formed in his mind, and not whether he had capacity to transact ordinary business.—Dowdey v. Palmer, Ill., 122 N. E. 102.

91. **Witnesses**—Cross-examination. — Reasonable cross-examination to show falsity of other testimony of the witness, or his bias and prejudice, is matter of right.—Commonwealth v. Russ, Mass., 122 N. E. 176.